Supreme Court, U.S.
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No. 91-693

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1991

FEDERAL INSURANCE COMPANY,
Petitioner,

vs.

CITY OF LAKELAND,
Respondent.

Petition for Writ of Certiorari To The United States Court of Appeals For The Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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CITY OF LAKELAND'S BRIEF IN OPPOSITION

INTRODUCTION

In its petition for writ of certiorari, Federal Insurance Company seeks to save an appeal that was never lost. Ignoring most of the complicated procedural history below, Federal neglects to inform this Court that Federal still has a valid appeal of the attorneys' fees judgment before the Eleventh Circuit, despite the court's dismissal of its defective April 20, 1990 appeal. Thus, the issues raised here are of purely academic interest. Moreover, this Court should deny Federal's petition because the result reached by the challenged Eleventh Circuit order was both just and correct under the circumstances of this complex, procedurally tortured lawsuit. Any review by this Court would

needlessly entangle the Court in the resolution of complicated, moot jurisdictional issues underlying the dismissed appeals --- without benefit to any party to the appeals below or to future litigants. This Court should deny Federal's petition.

In its response to Federal's petition for writ of certiorari, the City of Lakeland will be referred to as "Lakeland". Federal Insurance Company will be referred to as "Federal" and Chas. T. Main, Inc. and Fairfield Engineering Company, Federal's co-counterdefendants below, will be referred to as "Main" and "Fairfield", respectively. Federal's appendix will be referred to as "A-(page number)" and Lakeland's appendix will be referred to as "L-(page number)".

STATEMENT OF CASE AND FACTS

Background

This case arises from a complex multi-claim, multi-party omnibus lawsuit concerning the construction of a power plant for the City of Lakeland, Florida. In the action below, the United States District Court for the Middle District of Florida grouped the multiple claims below into several component claims, each component claim dealing with a particular power plant operational system. The component claims were then set for separate trials.

Federal's petition for writ of certiorari concerns Federal's appeal of an attorneys' fees award granted postjudgment in one of the severed component trials --- the trial

concerning the coal handling system for the power plant. One year after judgment (the "Coal Judgment") was entered for Lakeland in the coal claims trial, the district court entered a March 21, 1990 order ("Order") regarding postjudgment motions for attorneys' fees and costs filed by Lakeland and another party to the coal claims trial, Chas. T. Main, Inc. (A-1).

The Attorneys' Fees and Costs Award - The March 21, 1990 Order and Judgment

The March 21, 1990 Order addressed both the fees and costs issues raised by the parties' motions (A-1). The Order granted a certain amount of attorneys' fees in favor of Lakeland and against Federal, but denied Main's request for attorneys' fees. (A-29). The Order determined the amount of Main's costs award, but deferred ruling on Lakeland's costs until Lakeland produced

certain documentation for the trial court's consideration (A-30-31). The Order also instructed the clerk to enter judgment for attorneys' fees in accordance with the Order (A-29). A judgment ("Judgment") for attorneys' fees was entered on March 21, 1990 (A-32).

The Rule 59 and 52(b) Motions

On March 29, 1990, Main filed a motion to alter or amend pursuant to Federal Rule of Civil Procedure 59(e), requesting the court to alter or amend "its Judgment and Order entered March 21, 1990" by including additional taxable costs in favor of Main (A-42). On April 4, 1989, Federal[1] filed

[1] Federal's motion to alter or amend was filed jointly with its co-counterclaim defendant, Fairfield Engineering Company. Federal is the insuror of Fairfield. Since Fairfield's participation in the lawsuit below is not material to the issues before this Court, any joint filings by Federal and Fairfield will be referred to as Federal filings only.

a motion to alter or amend requesting the trial court "to alter or amend the Judgment and Order entered March 21, 1990" by correcting a mathematical error in the trial court's computation of costs to Main (A-35). Lakeland filed on April 6, 1990, a motion to reconsider the amount of its March 21, 1990 attorneys' fees award pursuant to Federal Rule of Civil Procedure 52(b), requesting the court to increase Lakeland's fees award.

Federal's April 20, 1990
Notice of Appeal

Federal filed a notice of appeal from the Judgment on April 20, 1989 (A-46). The notice of appeal was filed during the pendency of the above described Rule 59 and 52(b) motions.

The Attorneys' Fees and Costs Award - The July 6, 1990 Amended Order and the August 7, 1990 Amended Judgment

On July 6, 1990, the trial court amended its March 21, 1990 Order ("Amended Order") after ruling on the parties' pending motions (A-49). The July 6, 1990 Amended Order granted Federal's and Main's motions to alter or amend, but denied Lakeland's 52(b) motion as untimely (A-63-64). The court additionally determined Lakeland's costs award (A-64). The Amended Order further directed the clerk to enter judgment reflecting the court's amendment of the March 21, 1990 Order concerning Main's costs award, and to enter judgment for costs to Lakeland (A-63-64). An amended judgment ("Amended Judgment") was entered accordingly on August 7, 1990 by the clerk (A-65). The trial court did not,

however, certify the the fees and costs award for immediate appeal pursuant to Federal Rule of Civil Procedure 54(b).[2]

The 54(b) Certification Motion and Subsequent Notices of Appeal

On August 3, 1990, Lakeland filed a motion for 54(b) certification of the Amended Order on fees and costs.[3] In an abundance of caution to protect Lakeland's

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[2] The trial court had previously certified the Coal Judgment for immediate appeal pursuant to Rule 54(b). Fairfield/Federal's timely filed appeal of the Coal Judgment is pending before the Eleventh Circuit.

[3] Other component claims in the omnibus lawsuit --- with their own attendant attorneys' fees and costs claims --- were still pending unresolved before the district court at the time the Amended Order and Amended Judgment were entered. Under these circumstances, Lakeland believed the instant award of attorneys' fees and costs relating to the Coal Judgment lacked the requisite finality for immediate appeal without 54(b) certification.

right to appeal the attorney' fees award, Lakeland also filed a notice of appeal from the Amended Order on August 3, 1990 (L-1). Federal filed a notice of appeal from the Amended Judgment on September 7, 1990 (L-4).

The 54(b) Certification Order and Additional Notices of Appeal

Several months later, on January 9, 1991, the trial court granted Lakeland's motion for 54(b) certification of the Amended Order (L-7). Both Lakeland and Federal again filed notices of appeal from the 54(b) certified Amended Order and Amended Judgment on February 8, 1991 (L-12, 16).

The Eleventh Circuit Order

The Eleventh Circuit addressed this series of appeals from the fees and costs awards in an order entered on June 19, 1991

(the "Eleventh Circuit Order") (A-67). The Eleventh Circuit dismissed all of the pending appeals for various jurisdictional defects except the parties' most recent appeals filed on February 8, 1991 (L-12, 16). The Eleventh Circuit Order additionally construed the trial court's order granting 54(b) certification of the fees and costs award as an order vacating and reentering the Amended Judgment on attorneys' fees and costs, pursuant to Federal Rule of Civil Procedure 60(b) (A-72). The court's stated purpose for this construction was to preserve the appeals of both Lakeland and Federal (A-72).

The Eleventh Circuit Order left both Lakeland and Federal with valid appeals of the attorneys' fees and costs award pending before the Eleventh Circuit. Federal, nonetheless, filed a motion for rehearing

regarding the Eleventh Circuit's dismissal of Federal's initial April 20, 1990 notice of appeal of the Judgment. Federal's motion for a rehearing --- construed by the Eleventh Circuit as a motion for reconsideration --- was denied on July 26, 1991 (A-74). Federal's Petition to this Court followed.

SUMMARY OF THE ARGUMENT

Federal's petition for writ of certiorari must be denied by this Court for several reasons. Firsc, Federal cannot be permitted to abandon its prior treatment of the district court's Order and Judgment as a single judical act merely because Federal now finds it to its advantage to challenge a portion of the Eleventh Circuit Order. Federal's post fee award motion addressed both the Order and the Judgment, and tolled the time for appeal of all the issues

addressed in the court's Order and Judgment.

Additionally, the issues raised by Federal's petition are moot in this lawsuit. Federal does not challenge the Eleventh Circuit's ruling that the fees Judgment was vacated and reentered by the district court on January 9, 1991. This Court's review of the disposition of Federal's earlier filed appeal is clearly pointless, particularly where Federal has not lost its appeal of the fees award.

Finally, the Eleventh Circuit's dismissal of all of the earlier-filed duplicative appeals correctly resolved a potential procedural quagmire of jurisdictional issues underlying the dismissed appeals. The Eleventh Circuit Order efficiently freed the parties' later filed appeals of the attorneys' fees judgment from a tangle

of procedural issues --- correctly permitting the fees appeals to move forward toward resolution. A grant of Federal's petition would only force the parties, this Court, and the Eleventh Circuit into a meritless confrontation of these complicated issues.

Certainly no brightline rule for future litigants can possibly emerge from the contorted procedural posture of this case, nor will a decision in Federal's favor "restore" any lost right of appeal to Federal. This Court, therefore, should not disturb the correct result reached below in this complex multi-party, multi-claim lawsuit. Federal's petition for writ of certiorari should be denied.

REASONS FOR DENYING THE WRIT

I. THE ELEVENTH CIRCUIT CORRECTLY DISMISSED FEDERAL'S APRIL 20, 1990 APPEAL FROM THE MARCH 21, 1990 ATTORNEYS' FEES JUDGMENT.

Federal's petition to this Court is, at best, a hollow academic excercise addressing empty issues in this lawsuit. The unchallenged portions of the Eleventh Circuit Order retaining Federal's later, identical appeal of the attorneys' fees Judgment effectively moot any attempt by Federal to reinstate an appeal that was never lost. Federal's instant attempt to quibble over which of its series of duplicative notices of appeals is, in fact, the "real" notice of appeal is simply meaningless where Federal's appeal of the fees Judgment was fully preserved by the

Eleventh Circuit Order and is pending before that court today.

In fact, the Eleventh Circuit Order did no more than correctly preclude Federal from pursuing an improper piecemeal appeal of Lakeland's attorneys' fees award. The Eleventh Circuit Order dismissing Federal's premature notice of appeal implicitly and correctly ruled that a timely served Rule 59 motion tolls the appeal time for all issues addressed in an order, regardless of whether the Rule 59 motion concerns the particular issue sought to be appealed. Federal's attempt to artificially divide the Order addressing fees and costs into separate, individually appealable judgments is nothing more than a strained attempt to invite this Court's review of issues already efficiently resolved by the Eleventh Circuit. Neither the record

Procedure, nor the caselaw supports Federal's argument.

The record below reveals that both the district court's Order and Amended Order evinced the trial court's clear intent to address the pending fees and cost issues in a single amended judgment. The March 21, 1990 Order left no doubt that a later ruling on costs taxation would be forthcoming. Indeed, the Amended Order expressly amended the March 21, 1990 Order to include the court's decision on costs and expressly directed the clerk "to enter judgment accordingly" (A.63). The clerk thus correctly reflected the court's intent in entering the Amended Judgment on August 7, 1990 in accordance with the court's Amended Order.

Further, all of the parties at the time the Order and Judgment were entered treated

the Order and Judgment as one. Their Rule 59 and Rule 52(b) motions uniformly requested the district court to alter or amend or reconsider both the Order and the Judgment. Federal's own motion to alter or amend expressly asked the district court to "alter or amend the Judgment and Order entered March 21, 1990" (A-35) (emphasis added). Federal cannot be permitted to file a 59(e) motion specifically referencing both the Judgment and Order and then suddenly change its position to now claim that the 59(e) motion was directed only to the order and had no tolling effect on the judgment.

If this Court agreed with Federal's reasoning, parties would no longer be able to automatically rely on 59(e) motions to toll the time for appeal. Orders, judgments and tolling motions would have to

be cross-referenced for a careful match of motions to issues sought to be appealed. Should any ambiguity or uncertainty arise, protective notices of appeal would have to be filed to preserve the party's right of appeal. The appellate courts would be asked to scrutinize countless motions tolling the time for appeal under Federal Rule of Appellate Procedure 4(a)(4) to determine, issue by issue, the timeliness of a party's appeal. Such an undesirable result clearly must be avoided by this Court.[4]

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[4]Additionally, Federal's attempt to split hairs over whether the district court's March 21, 1990 Order was an appealable Rule 58 "judgment" is overly technical and unsupported by the language of the Rules. Federal Rule of Civil Procedure 54(a) plainly states that "'judgment' as used in these rules includes a decree and any order from which an appeal lies" (emphasis added). Thus, the Federal Rules of Civil Procedure clearly contemplate and permit the appeal of orders as well as judgments.

Even if this Court disagreed with the Eleventh Circuit's reasoning in determining that Federal's April 20, 1990 notice of appeal was a legal nullity, the Eleventh Circuit, nonetheless reached a correct result. The Eleventh Circuit Order heeded the oft-repeated judicial admonishment that "procedural rules are not meant to be a trap for the unwary" and correctly preserved both Federal's and Lakeland's right to appeal the fees and costs awards---despite the disagreement between the parties as to the particular point at which the awards became final and appealable over the lengthy course of this complex lawsuit.

The Eleventh Circuit, in fact, eliminated this disagreement among the parties by effectively nullifying all of the appeals filed prior to the trial court's January

9, 1991 vacation and reentry of the attorneys' fees and costs award. Importantly, Federal has not petitioned this Court for review of the Eleventh Circuit's construction of the trial court's 54(b) certification order as a Rule 60(b) order. Thus, the issues proposed by Federal for this court's review have, in fact, been mooted by the unchallenged portion of the Eleventh Circuit Order deeming the Judgment to have been vacated and reentered on January 9, 1991.

Clearly, then, Federal's petition makes much ado about nothing. Though Federal argues that the Eleventh Circuit erred in dismissing its April 20, 1990 notice of appeal, Federal has not and cannot claim any loss or prejudice arising from the alleged error. The plain fact before this Court is that Federal seeks to revive an

appeal which is already safely revived by the Eleventh Circuit Order. Thus, Federal's Petition raises, at most, issues of possible academic interest, but of no real import to the lawsuit below. Federal's right to appeal the attorneys' fees Judgment, as amended by the Amended Judgment, and vacated and reentered by the trial court on January 9, 1991, remains fully preserved by the unchallenged portion of the Eleventh Circuit Order. Federal's appeal of the fees award is, in fact, currently pending before the Eleventh Circuit.

II. THIS COMPLEX, PROCEDURALLY TORTURED CASE DOES NOT PRESENT A PROPER OPPORTUNITY FOR THE COURT TO ESTABLISH A BRIGHTlINE RULE REGARDING THE FINALITY OF ATTORNEYS' FEES ORDERS OR JUDGMENTS.

Federal seeks to enmesh this Court in a procedurally complicated case involving additional jurisdictional twists and

tangles outside the scope of review established by Federal's petition. The Eleventh Circuit Order properly eliminated these jurisdictional pitfalls to the parties' appeals by eliminating all of the parties' prior notices of appeal. If this Court should rule in favor of Federal on the issues presented in Federal's petition, the appellate courts' judicial labor would not be at an end. Indeed, a ruling favorable to Federal opens a Pandora's box of issues that would also have to be resolved by this Court or the Eleventh Circuit.

At the very least, this Court would additionally have to determine whether the March 21, 1989 Order and Judgment needed 54(b) certification from the district court, and even whether the Order and

Judgment could be considered a final order and judgment.

The instant fees Judgment was certainly not a final fees judgment within the context of the multi-claims omnibus lawsuit. Several component merits claims remained pending before the trial court at the time the instant Judgment was entered. Each of these pending component claims involved a potential claim for attorneys' fees by the prevailing party. Thus, judicial labor concerning the grant of attorneys' fees in the omnibus lawsuit was far from finished on March 21, 1990, the date the fees Judgment was entered.

Even within the narrower context of the appeals below, the March 21, 1990 Order and Judgment may have lacked the requisite finality for appellate jurisdictional purposes. This Court would have to

determine whether the Judgment was actually an unappealable interlocutory judgment prior to its amendment on August 7, 1990 to reflect the trial court's Amended Order --- the trial court's final order ending all judicial labor on the parties' collateral post-Coal Judgment claims.

Numerous issues would also remain for resolution by the Eleventh Circuit. For example, the Eleventh Circuit would have to determine the effect of this Court's favorable ruling for Federal on all of the subsequent notices of appeal filed by the parties. The court would have to decide whether Lakeland's first notice of appeal filed on August 3, 1989, was timely and, if not, whether it could be considered a valid cross appeal, or whether the untimely appeal should be allowed under the Thompson

exception.[5] The court below would also have to deal with the set of appeals already validated by the court in its June 19, 1991 Order.

Clearly, in view of the complexity of the above described procedural circumstances of this case, a favorable ruling for Federal on the issues raised in Federal's petition will not suffice to "clarify" the tortured procedural posture of this case. Quite the opposite, a reversal of the Eleventh Circuit's resolution of this series of appeals would

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[5] See Thompson v. Immigration & Naturalization Service, 375 U.S. 384, 84 S. Ct. 397, 11 L. Ed 2d 404 (1965). Lakeland filed its Rule 52(b) motion to reconsider on April 6, 1990 in reliance on the trial court's prior ruling regarding a timely filing of such a motion. In its December 8, 1989 order, the trial court had previously held that the three day mail time extension provided by Federal Rule of Civil Procedure 6(e) was applicable to appeal time-tolling postjudgment motions.

plunge the parties back into an appellate abyss of jurisdictional challenges and needless delay.

More importantly to this Court, however, a grant of Federal's petition fails to provide this court with an appropriate opportunity to announce any brightline rule to guide future litigants regarding the alleged issues raised by Federal. Assuming for the sake of argument that there was some confusion or conflict among the circuits regarding the applicability of Federal Rules of Civil Procedure 58 and 59 and Federal Rule of Appellate Procedure 4(a)(4) to postjudgment collateral fees and costs awards, the instant case is far too procedurally tangled to showcase a clear rule by the Court in support of either the Eleventh Circuit Order or in favor of Federal.

Similiarly, even if this Court agreed with Federal's contorted contention that the Eleventh Circuit's dismissal of its April 20, 1990 notice of appeal conflicted with the "principles behind the Court's rulings" in prior cases,[6] the complex posture of the instant case precludes any meaningful resolution of the alleged conflict. Briefly stated, Federal's petition concerns a premature appeal of a postjudgment fees award which was assailed by Rule 59 motions regarding a postjudgment costs issue, addressed but unresolved by the Order creating the fees award, and by a Rule 52(b) motion which was untimely because of the party's reliance on a prior erroneous ruling on timeliness by the court --- all within the context of a

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[6] See cases cited in Federal's Petition at 25-26.

multi-claim, multi-party, multi-judgment omnibus lawsuit with pending unresolved claims encompassing unresolved attorneys's fees claims. Despite Federal's suggestion to the contrary, Lakeland submits that the complexity and interplay of this multitude of procedural and factual circumstances clearly fail to offer fertile ground for this Court to sow seeds of clarity on any issue --- and certainly not on Federal's alleged "issue" of the interplay between the tolling provisions of Federal Rule of Appellate Procedure 4(a)(4) and Rule 59(e) motions.

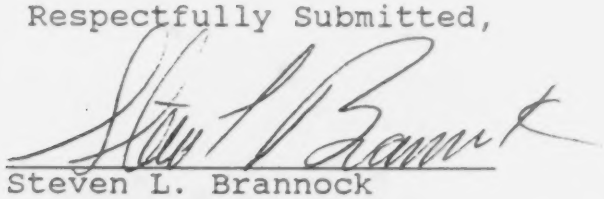
Should this Court deny Federal's petition, both Federal and Lakeland will remain substantively unscathed by the denial. Instead, their respective appeals of the fees award will be free to proceed unimpeded toward a just resolution before

the Eleventh Circuit. Any other disposition by this Court would unnecessarily torture fundamental principles of judicial economy supporting a fair, efficient judicial disposition of the instant case.

CONCLUSION

For all the foregoing reasons, Lakeland urges this Court to deny Federal's Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit.

Respectfully Submitted,



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Attorneys for Respondent

APPENDIX

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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

Case No. 83-1394-CIV-T-10
Coal Handling System Claim

ECODYNE COOLING DIVISION
OF ECODYNE CORPORATION,
a Delaware Corporation

Plaintiff,

v.

CITY OF LAKELAND,

Defendant/Counterclaimant,
Appellant,

v.
FAIRFIELD ENGINEERING CO.,
FEDERAL INSURANCE CO.

Counterclaim/Defendants.
Appellees.

_____/

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that the City of Lakeland, counterplaintiff, appellant, appeals to the United States Court of Appeals for the Eleventh Circuit from the final judgment dated March 21, 1990, as

amended by the Court's order of July 6, 1990. The nature of the order is a final judgment denying in part Lakeland's claim for attorneys' fees against counterdefendant, appellee, Federal Insurance Company. This notice of appeal is filed for protective purposes only. The March 21, 1990 order (as amended) has not been certified by the District Court for immediate appeal under Section 54(b), Federal Rules of Civil Procedure. This notice has been filed to preserve Lakeland's right of appeal in the event the District Court and the Eleventh Circuit Court of Appeals hold that Section 54(b) certification by the District Court is unneccessary.

Respectfully submitted,

_____

Steven L. Brannock
Florida Bar No. 319651

Michael B. Colgan
Florida Bar No.191383
Richard M. Blau
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(813) 227-8500

Attorneys for City of Lakeland

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing instrument was furnished by U.S. Mail to Denise G. Morris, Esquire and Jeffrey D. Keiner, Esquire, Fisher, Rushmer, Warrenrath, Keiner, Wach & Dickson, P.A., Post Office Box 712, Orlando, Florida 32802; and to John L. Ashworth, Esquire and Ted G. McKinniss, Ashworth & McKinniss, 255 Executive Drive, Marion, Ohio 43302, on this 3th day of August, 1990.

Steven L. Brannock
Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

Case No. 83-1394-CIV-T-10

ECODYNE COOLING DIVISION OF
ECODYNE CORPORATION,

Plaintiff,

vs.

CITY OF LAKELAND,

Defendant/Counter-
claimant,

vs.

ECODYNE COOLING DIVISION OF
ECODYNE CORPORATION, et. al.

Counterclaim
Defendants.

_____/

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that Fairfield Engineering Company, and Federal Insurance Company, counterclaim defendants and cross-claimant, hereby appeal to the United States Court of Appeals for the Eleventh Circuit from:

1. The Judgment for costs in favor of counterclaimant City of Lakeland in the amount of $26,392.82 and in favor of cross-claim defendant Chas. T. Main Company in the amount of $18,835.67, which judgment was entered herein on August 7, 1990.

Respectfully submitted,

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- and-

MACFARLANE, FERGUSON,
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P.O. Box 1531
Tampa, Florida 33601
Telephone: (813) 223-2411

By: _____
D. James Kadyk, Esquire
Florida Bar Number 238325

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing instrument was furnished by U.S. Mail this 7th day of September, 1990, upon all persons named in the attached Service List.

D. James Kadyk,
Of Counsel

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

Case No. 83-1394-CIV-T-10

ECODYNE COOLING DIVISION OF
ECODYNE CORPORATION,

Plaintiff,

vs.

CITY OF LAKELAND,

Defendant/Counterclaimant

vs.

ECODYNE COOLING DIVISION OF
ECODYNE CORPORATION, etc, et. al.,

Counterclaim Defendants.
_____/

O R D E R

Before the Court is a motion, pursuant to Rule 54(b), F.R.Civ.P., by the City of Lakeland for certification of the Order entered on March 21, 1990 (as amended by the Order entered on July 6, 1990).

On March 2, 1989, the Court entered a judgment in the coal handling portion of

this case in favor of Lakeland on its claims against Fairfield and Federal, and in favor of Main on Fairfield's cross-claim. The Court certified the judgment on the merits pursuant to Rule 54(b), F.R.Civ.P. On March 21, 1990, the Court granted in part and denied in part Lakeland's motion for attorney's fees and awarded costs to Main against Fairfield and Federal. The March 21 Order directed the Clerk to enter Judgment with respect to Lakeland's claim for attorney's fees.

On April 20, 1990, Federal filed a notice of appeal of the March 21 Judgment on attorney's fees. Main, Fairfield and Federal moved to alter or amend the March 21 Order with respect to the award of costs to Main. Lakeland moved, pursuant to Rule 52(b), F.R.Civ.P., for reconsideration of the award of attorney's fees. On July 6,

1990, the Court denied Lakeland's motion as untimely, amended the costs awarded to Main, and awarded costs to Lakeland. On August 3, 1990, Lakeland filed a protective notice of appeal from the Judgment entered on March 21, 1990, but also moved to certify the March 21 Order pursuant to Rule 54(b). On August 7, 1990, the clerk entered an "Amended Judgment" with respect to costs, pursuant to the Court's direction in the July 6 Order. And on September 7, 1990 Fairfield and Federal filed a notice of appeal from the August 7 Judgment.

As both Federal and Lakeland seek to appeal the Court's determination with respect to Lakeland's petition for attorney's fees, the only issue is whether Rule 54(b) certification is necessary. Federal contends that the Court's Rule 54(b) certification of the March 1989

Judgment on the merits would encompass the subsequent cost and attorney fee orders entered in connection with the trial of the coal handling claims. Federal contends further that certification is unnecessary because the Court's attorney's fee determination is appealable as a collateral order under the Cohen doctrine. Finally, Federal urges the Court to simply allow the Eleventh Circuit Court of Appeals to resolve the issue.

The Court has already directed the Clerk to enter Judgment on the March 21 and July 6 Orders. The Court did not, however, certify these Orders pursuant to Rule 54(b). Upon due consideration, Lakeland's motion for certification pursuant to Rule 54(b) is GRANTED. The Judgments entered on March 21 and August 7 are certified pursuant to Rule 54(b).

IT IS SO ORDERED.

DONE AND ORDERED at Tampa, Florida, this 9th day of January, 1991.

Wm. Terrell Hodges
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

Case No. 83-1394-CIV-T-10

ECODYNE COOLING DIVISION OF
ECODYNE CORPORATION,

Plaintiff,

vs.

CITY OF LAKELAND,

Defendant/Counterclaimant,
Appellee/Appellant,

vs.

ECODYNE COOLING DIVISION OF
ECODYNE CORPORATION, et. al.

Counterclaim/Defendants.
Appellants/Appellees.

_____/

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that the City of Lakeland, Counterplaintiff, Appellant, appeals to the United States Court of Appeals for the Eleventh Circuit from the final judgment dated March 21, 1990, as amended by the Court's Order of July 6,

1990, and as certified as a final judgment pursuant to Federal Rule of Civil Procedure 54(b) by the trial court on January 9, 1991. The nature of the Order is a final judgment denying in part Lakeland's claim for attorneys' fees against counterdefendant, Appellee, Federal Insurance Company.

This Notice of Appeal is filed for protective purposes only. Lakeland is filing this Notice of Appeal because Lakeland is informed that appellees may argue that the trial judge does not have the power to consider Lakeland's Motion to Alter or Amend the Final Judgment, filed on January 22, 1991, pursuant to Federal Rule of Civil Procedure 59(e). Appellees may, therefore, assert that Lakeland's Rule 59(e) Motion to Alter/Amend the Final

Judgment does not toll the time for appeal.

Respectfully submitted,

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Florida Bar No. 319651
Michael B. Colgan
Florida Bar No.191383
Richard M. Blau
Florida Bar No. 347167
Post Office Box 1288
Tampa, Florida 33601
(813) 227-8500

Attorneys for City of Lakeland

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing instrument was furnished by U.S. Mail this 8th day of February, 1991, to Mark N. Miller, Esquire, City Hall, 228 S. Massachusetts Avenue, Lakeland, Florida 33802, John L. Ashworth, Esquire, Ashworth & McKinniss, 255

Executive Drive, Marion, Ohio 43302, Joseph H. Lowe, Esquire, Marlow, Shofi, Connell, Valerius, Abrams, Lowe & Adler, 2950 Southwest 27th Avenue, Coconut Grove, Miami, Florida 33133, and Richard J. Ovelman, Esquire, Baker & McKenzie, 701 Brickell Avenue, Suite 1600, Miami, Florida 33131.

Karol K. Williams
Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

Case No. 83-1394-CIV-T-10

ECODYNE COOLING DIVISION OF
ECODYNE CORPORATION,

Plaintiff,

vs.

CITY OF LAKELAND,

Defendant/Counter-
claimant,

vs.

ECODYNE COOLING DIVISION OF
ECODYNE CORPORATION, et. al.

Counterclaim
Defendants.

_____/

NOTICE OF APPEAL

Notice is hereby given that Fairfield Engineering Company ("Fairfield"), and Federal Insurance Company ("Federal"), counterclaim defendants and cross-claimants, hereby appeal to the United States Court of Appeals for the Eleventh

Circuit. This notice of appeal is filed for protective purposes only. Fairfield and Federal appeal from:

1. The Judgment in a Civil Case in favor of plaintiff City of Lakeland and against Fairfield and Federal entered on March 21, 1990 for attorney's fees of $109,485.10.

2. The order in a Civil Case in favor of plaintiff City of Lakeland and against Fairfield and federal entered on March 21, 1990 for attorney's fees of $109,485.10.

3. The Judgment in a Civil Case in favor of plaintiff City of Lakeland and courterclaim defendant Chas. T. Main, and against Fairfield and Federal entered on August 7, 1990 for costs of $26,392.82; and $18,835.67.

4. The Order in a Civil Case in favor of plaintiff City of Lakeland and counterclaim defendant Chas. T. Main, and against Fairfield and Federal entered on July 6, 1990 for costs of $26,392.82; and $18,835.67.

5. The Order of this court entered on January 9, 1991, relating to Lakeland's .Motion for

Certification pursuant to Rule 54(b) of March 21 and August 7, 1990 Judgments.

6. All prior orders and rulings which produced the aforementioned judgments.

Respectfully submitted,

John L. Ashworth
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- and-

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By: _____
D. James Kadyk, Esquire
Florida Bar Number 238325

Dated: February 8, 1991